

**ILLINOIS COMMERCE COMMISSION**

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and made their findings available to the parties in this docket, ComEd now seeks to respond to those findings with a proposal that the Commission enter into the record ComEd's supplemental rebuttal testimony and adopt, unchanged, a Proposed Order drafted by the company (complete with schedules), which it proposes should serve as the Commission's final word on all outstanding delivery service issues.

The company recommends that the Commission enter its testimony and that of other parties into the record during a one-day evidentiary proceeding, that ComEd's Proposed Order be presented by the ALJ to the Commission on the next day, that parties file two sets of exceptions in the following six days and that the Commission then devote a mere *four days* to analyze and evaluate an exhaustive audit, thousands of pages of expert witness testimony, two rounds of briefs and dozens of exhibits and schedules.

Without commenting on the substance of ComEd's proposed supplemental rebuttal testimony, the Commission must not adopt ComEd's schedule for this docket. Were the Commission to subscribe to the fast track treatment the company recommends, it would abandon the careful and deliberate consideration which it needs to give to the Liberty audit (and to testimony filed in the second phase of this case), an audit which this Commission concluded was necessary in order reach a reasonable resolution of the issues related to ComEd's delivery service rates. Order, Feb. 6, 2002, ICC Docket No. 01-0664, findings 2 and 3.

The People's arguments in support of their position follow below.

**I. The Motion's request for an expedited schedule for this docket should be denied.**

This docket is a ratemaking case, and as such the Commission has conducted it as a contested

case. 220 ILCS 5/10-101. Under the Public Utilities Act, 220 ILCS 5/1-101, ratemaking cases are subject to the provisions of the Illinois Administrative Procedure Act, 5 ILCS 100/10/25. A fair administrative hearing requires that the parties be given the opportunity to be heard in an “orderly” proceeding “adapted to the nature and circumstances of the dispute.” Piotrowski v. State Police Merit Board, 85 Ill.App.3d 369, 406 N.E.2d 863 (1980).

ComEd’s proposed schedule is not appropriate for the nature of this proceeding.<sup>1</sup> The original schedule in this case set aside seven days for hearings to determine a just and reasonable level of rates for ComEd’s Delivery Service Tariff (“DST”). The one-day evidentiary hearing proposed by ComEd’s Motion does not provide enough time for the Commission to make a reasoned determination of the just and reasonable level for DST rates. Nor does a one-day hearing provide the parties with adequate time to cross examine witnesses. Even with the withdrawal of some of the intervenor testimony in this case, there remains too much to accomplish in one day. Indeed, ComEd alone has offered 15 pieces of testimony in this

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<sup>1</sup> Arguably, ComEd’s motion has already fallen victim to its own conditions of withdrawal. Paragraph 11 of ComEd’s Motion states that ComEd’s limits its waivers to a fully briefed and argued case only “if the Commission [ ]grants this Motion in its entirety...” Motion at 5. Paragraph 12 of the Motion sets out a specific schedule that set evidentiary hearings for March 10 and issuance of a Proposed Order on March 11, with a final Commission vote on March 21, 2003. Motion at 5-6. Since the Notice of Schedule, issued by the ALJs on March 6, 2003 has already prevented evidentiary hearings from being held on March 10, the Motion cannot be fully granted and, according to the language of the Motion, “...ComEd will withdraw this Motion and... the supporting documents, ComEd’s limited, conditional waivers shall be void and have no effect, and ComEd will proceed in this Docket with the record as it existed prior to the entry of the order and approvals requested herein.” Motion at 5. In effect, the language of ComEd’s Motion appears to render the pleading ineffective as soon as the Commission’s Notice of Schedule modified the schedule set out in the Motion.

phase of the case, the last two of which were served on parties the same day as ComEd's Motion.

If the Commission adopts ComEd's schedule, the parties will be further prejudiced by this proposed change to the docket schedule by the dramatically shortened time parties will have to prepare for the evidentiary hearing. The original evidentiary hearing was scheduled to start on April 8 and continue through April 16. ComEd would have the Commission believe that an administrative proceeding that would have taken another month to prepare for and seven days to accomplish can now be done in just one day. The Commission must not let a lawful consideration of the record be compromised.

However, even in that instance, the single day scheduled for the evidentiary hearing to take place must at least be used to enter all of the Phase II pre-filed testimony and exhibits into the record. While ComEd's motion does not specify, beyond its own witnesses, what should be entered in this abbreviated evidentiary hearing (motion at ¶ 6), the attached Proposed Order describes the testimony of: David J. Effron (Ex. GC 7.0), on behalf of GCI; Bryan C. Sant (ICC Staff Ex. 28.0) and Mike Luth (ICC Staff Ex.29.0), on behalf of Staff; and the rebuttal testimony of: David J. Effron (GC Ex. 8.0), on behalf of GCI; Bryan C. Sant (staff Ex. 30.0), Scott A. Struck (Staff Ex 33.0), Burma C. Jones (Staff Ex. 32.0), Bruce A. Larson (Staff Ex. 33.0) and Mike Luth (Staff Ex. 34.0), on behalf of Staff; and John Antonuk and Robert Stright (Liberty Ex. 2.0) and John Antonuk and Dennis M. Kalbarczyk (Liberty Ex. 3.0), on behalf of Liberty.

**II. ComEd's request to have the Commission adopt its Proposed Order before hearings take place is contrary to the Illinois Supreme Court's ruling in *BPI I*.**

Even if the proceedings in this case could be completed in a single day, which the People

maintain cannot be accomplished, ComEd's request that the Commission adopt its draft Proposed Order *without modification* subverts fundamental principles of due process by asking the Commission to make decision without considering all the evidence on the merits. Given the fact that not all parties to this proceeding are parties to the March 3, 2003 Stipulation, ComEd's proposal does not have the unanimous support of the parties. The Commission may consider a settlement proposal that lacks unanimous support only if it does so on the merits, with an independent finding, "supported by substantial evidence in the record as a whole." Business and Professional People for the Public Interest, 136 Ill.2d 192, 216-17 (1989). Therefore, the Commission must take whatever time is necessary to consider *all the evidence* in this case in a manner that permits it to consider the issues *on the merits*. To do otherwise would be reversible error.

The People therefore recommend that the Commission adopt a schedule that allots the parties and the Commission sufficient time to evaluate the record evidence on the merits.

### **III. The Commission must direct the compilation of a complete record in this case.**

Furthermore, where the Commission imposes an abbreviated evidentiary hearing and schedule, it must still ensure a complete record by admitting the audit report and all testimony supporting or opposing its application. In addition, Liberty's pre-filed testimony authenticating the final audit report, with attachments, must be entered into the record. See Order, Feb. 6, 2002, ICC Docket No. 01-0664 at ¶ 2. Indeed, pursuant to the ICC Order in Docket No.01-0664, the parties "may not object to the auditor's report becoming part of the evidentiary record in the pending ComEd delivery services proceeding, Docket No. 01-0423." Order, Feb. 6, 2002, ICC Docket No. 01-0664 at ¶ 5(a). Considering that the Proposed Order attached to ComEd's Motion refers to all of these items as

part of the evidentiary record, ComEd does not appear to object to their entry into the evidentiary record in this docket.

**IV. Any settlement agreements among the parties and ComEd must be offered as part of the record so that the Commission may fully evaluate the basis for ComEd's Motion, Stipulation and Proposed Order prior to considering ComEd's proposal on its merits.**

In order to properly evaluate ComEd's Motion, the Commission must have access to all information to which the Motion refers. This information necessarily includes any documents which may memorialize or distill the discussions referenced in paragraph 9 of the Motion into a coherent agreement between the parties. The Commission must have a full understanding of ComEd's Motion, Supplemental Rebuttal Testimony, the Stipulation and the Proposed Order to be able to evaluate this case on its merits and decide whether or not to grant any part of the Motion, including any abbreviated schedule. In particular, the Stipulation dated March 3, 2003, and filed by ComEd with the Commission, refers to discussions the parties conducted on "issues of importance...such as competition in electricity supply and achieving greater stability and certainty in the pricing and cost of electricity." Stipulation at 1.

Because the Stipulation further states that the reason behind the signatories' support of the Proposed Order is this "overall history," the Commission must have access to any document describing this history. The Commission should therefore direct the signatories to any settlement agreements executed in connection with this docket to submit such document into evidence.

**V. Conclusion**

WHEREFORE, the People respectfully request that the Commission deny ComEd's motion in a manner consistent with the arguments presented above and set a procedural schedule that will allow the Commission the opportunity to consider all the issues on the merits, consistent with principles of due process and Illinois law.

Respectfully submitted,

THE PEOPLE OF THE STATE OF ILLINOIS  
Lisa Madigan, Attorney General

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Mark Kaminski  
Assistant Attorney General

Dated: March 10, 2003

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

COMMONWEALTH EDISON COMPANY )  
 ) Docket No. 01-0423  
Petition for approval of delivery services tariffs )  
tariff revisions and of residential delivery services )  
implementation plan and for approval of certain )  
other amendments and additions to its rates, terms )  
and conditions. )

**NOTICE OF FILING**

**PLEASE TAKE NOTICE** that on this date, March 10, 2003 we have filed with the Chief Clerk of Illinois Commerce Commission 527 East Capitol Avenue, Springfield, Illinois 62794-9280 the People of the State of Illinois' Response to Commonwealth Edison Company's Motion to File Supplemental Rebuttal Testimony and Modify the Schedule on behalf of Office of the Attorney General of Illinois via e-docket.

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Mark G. Kaminski  
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**CERTIFICATE OF SERVICE**

I, Mark G. Kaminski, Assistant Attorney General, hereby certify that I served the above identified documents upon all active parties of record on the attached service list on March 10, 2003, by electronic mail. Hard copies will be provided upon request

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